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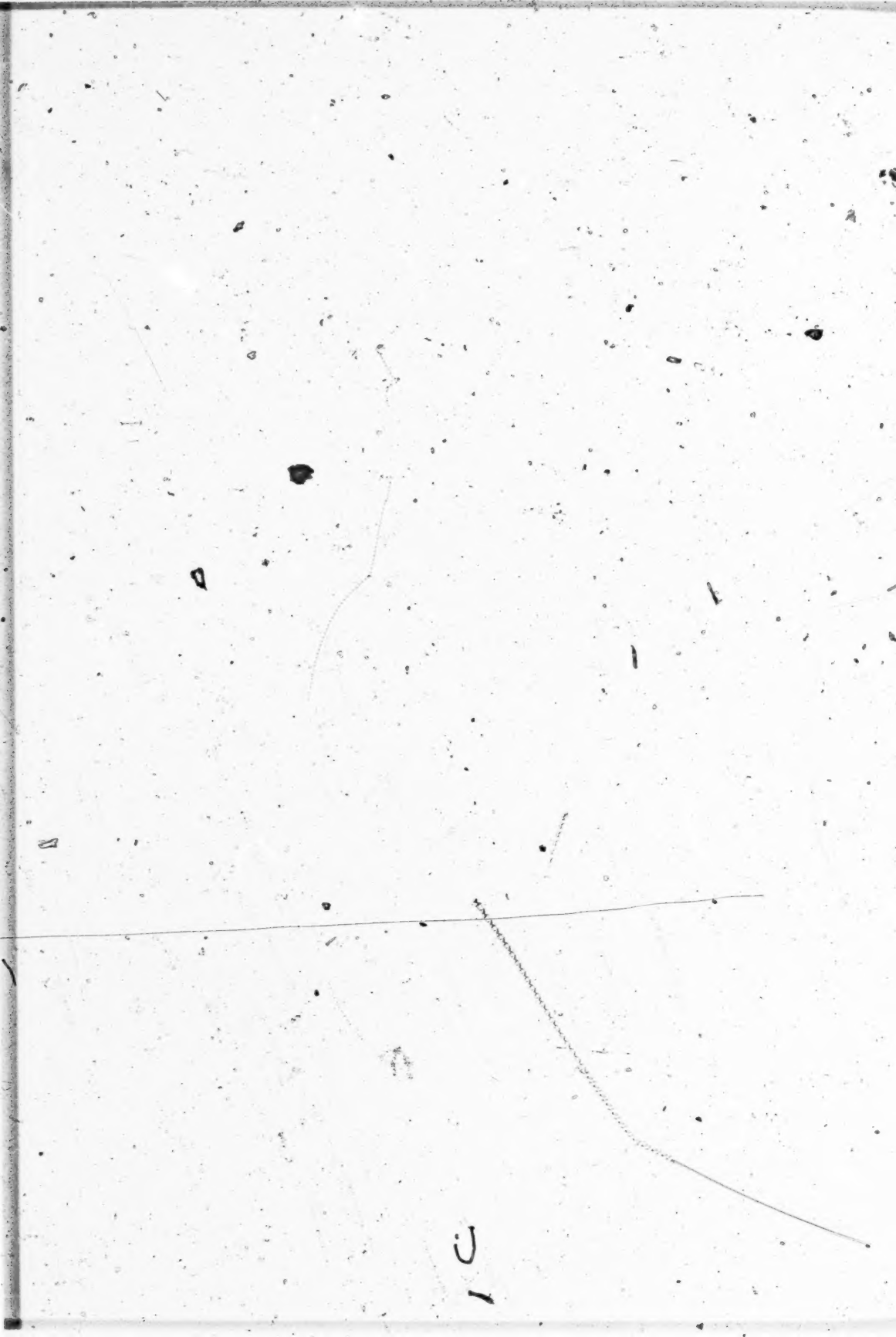
In The
SUPREME COURT OF THE UNITED STATES
October Term, [redacted] 1969

AMERICAN BROADCASTING COMPANIES, INC. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
NATIONAL ASSOCIATION OF BROADCASTERS et al. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
NATIONAL BROADCASTING COMPANY, INC. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA;
THE TOBACCO INSTITUTE et al. v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT JOHN F. BANZHAF III

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STAY IN RELATED CASES

No position is taken as to whether the petitions for certiorari should be granted but it is respectfully suggested that argument in the closely related cases of Red Lion Broadcasting Co. v. Federal Communications Commission (No. 2) and United States v. Radio Television News Directors Association (No. 717) be stayed so that all three cases which involve the same basic issues can be heard together. Should this not be possible, it is respectfully suggested in the alternative that the Red Lion and R.T.N.D.A. cases should not be decided prior to the time this Court has had the opportunity to consider the facts and the arguments of counsel in the instant case. It should be noted that this Court stayed the proceedings in the Red Lion case for a considerable period of time at the request of broadcasting interests so that it could consider that case and the R.T.N.D.A. case at the same time. Only a short additional delay would be necessary to allow this Court to consider the instant case with the other two.

All three of these cases directly involve the F.C.C.'s "Fairness

Doctrine" which has been the cornerstone of its regulatory policy almost since its inception. In all three cases the constitutionality of this doctrine is challenged. Each case, however, represents a different facet of a very complex problem and it is respectfully submitted that the Court cannot deal with the heart of the matter without a clear understanding of its many ramifications. To attempt to do so may well lead to piecemeal decisionmaking or, worse yet, throwing out the baby when the problem may just be that its bath water is dirty.

The decision below rested on two alternative grounds:

(1) that under the "Fairness Doctrine" a broadcaster choosing to present commercial spot announcements arguing that cigarette smoking is advisable must also make significant time available for presenting the alternative view that cigarette smoking is dangerous to health; and

(2) that the Commission could properly find that it is not in the public interest (even apart from the "Fairness Doctrine") for a broadcaster

to advocate cigarette smoking without alerting its audience to the serious risks involved.

Implicit in both grounds is the assumption that the Commission may constitutionally consider the programming of a station in determining whether renewal of its license will serve the "public interest, convenience and necessity" under Sections 307(a) and (d) and 309(a) of the Communications Act of 1934. Although the Commission has considered the quality and value of programming as an important element in granting and renewing broadcast licenses in thousands of cases ever since the enactment of the Radio Act of 1927,[1] the constitutionality of this procedure has been thrown into doubt by the decision of the Court of Appeals for the Seventh Circuit in the R.T.N.D.A. case. Although the opinion in that case does not go so far as to hold

1. See Note, Government Regulation of the Program Content of Television Broadcasting, 19 G.W.L. Rev. 312 (1950) and Note; Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964) and cases cited therein.

that a broadcaster has a constitutional right to use the public channel assigned to him to broadcast whatever he pleases, that inference may clearly be drawn from its reasoning. Thus, the decision suggests that the Commission's regulatory power is no broader that "to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems."

The instant case, whether approached through the Fairness Doctrine or through the public interest standard of the Act, presents another facet of the same question: Is freedom of speech over the air waves a privilege to be enjoyed only by station owners and those able to buy time or may Congress constitutionally require that there be a reasonable right of access for other persons and other views.[2]

The special facet of the question displayed in this case is that

2. See J. Barron, Access to the Press-A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

here it is undeniable that access to public channels has been and will continue to be sold to the highest bidder without regard to the consequences in terms of the death and disability which necessarily result. The economic disparity between cigarette manufacturers and public health groups assures that the pleasures of cigarette smoking will be promoted unceasingly and the dangers rarely if ever mentioned unless the FCC's action is sustained.[3] Thus it presents in its clearest form the question whether broadcast channels are constitutionally similar to streets, parks, transportation terminals, and other public and quasi-public places to which access is constitutionally guaranteed--or at least may be legislatively guaranteed --for the expression of conflicting points of view, or contrariwise, whether the channels are the private and exclusive property of the licensees, to sell or use as they please, provided only that the technical standards are observed.

It is also respectfully suggested that the questions presented in

3. In 1967 the most widely advertised product on television was cigarettes with an outlay of over 250 million dollars.

the petitions for a writ of certiorari do not fairly state the legal issues.

QUESTIONS PRESENTED

It is misleading to treat the Commission decision in this case as if it were a regulation or directive that stations carry "anti-smoking commercials." The Commission has not adopted any such rule or requirement. It has merely made clear to the industry that the public issue as to the advisability of smoking is both important and controversial and that programming which advocates smoking is not exempt from the Fairness Doctrine merely because it takes the form of paid commercials.

The Commission's decision is consistent with its long-standing application of the rule of fairness to liquor commercials in Petition of Sam Morris, 11 F.C.C. 197, 3 P & F Radio Reg. 154 (1956) on similar reasoning:

> "What is for other individuals merely a routine advertising plug extolling the virtues of a beverag

> essentially no different from other types of product advertising, is for these individuals the advocacy of a practice which they deem to be detrimental to our society. Whatever the merits of this controversy *** it is at least clear that it may assume the proportions of a controverted issue of public importance. The fact that the occasion for the controversy happens to the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it as such an issue."

There has been no occasion to apply the Sam Morris decision to any other product until this case, but its authority has never been questioned. The Sam Morris decision was cited in the 1949 Editorializing Report as illustrative of the Commission's view that the Fairness Doctrine "applies to all subjects of substantial importance to the community coming within the scope of free discussion

in the First Amendment..."[4] The Commission Chairman also advised the Senate Commerce Committee of the Morris decision in 1952[5] and it is discussed in a recent study for that Committee.[6]

There is nothing unusual about the procedure here. The Commission has often indicated that particular subjects fall within the Fairness Doctrine requirements or that the public service responsibilities of

4. See FCC 1246 (Para 7). The Editorializing Report has often been called to the attention of Congress. See e.g. Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong. 1st Sess. on Editorializing Practices, 1963, p. 84.

5. Hearings Before the Senate Committee on Interstate and Foreign Commerce on S. 2444, 82nd Cong. 2nd Sess. 1952, p. 7.

6. Senate Committee on Commerce, Subcommittee on Communications, Fairness Doctrine, 90th Cong. 2nd Sess. 1968, pp. 24-25.

stations require them to make their facilities available for important public matters.

During the last national campaign, the Commission issued a public notice "to call licensees" attention to the desirability of making their facilities effectively available to candidates of political office even though this may require modification of normal station format".[7] The Commission also called attention to the language of this Court in Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 as follows:

> ". . . (T)he thrust of Sec. 315 is to facilitate political debate over radio and television. Recognizing this, the Communications Commission considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit."

7. Public Notice of October 29, 1968, FCC 68-1070, 14 P & F Radio Reg. 2d 566.

and to the similar statements by the Commission in the 1960 Programming Statement and in its Memorandum to the House Subcommittee on Communications and Power.[8]

If a licensee chooses to broadcast statements in favor of smoking, he must present the other side of the issue. However, just as in dealing with political issues[9] and other Fairness Doctrine subject, his obligation is only as defined in Section 315 of the Act: "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." He can comply by presenting "anti-smoking announcements" as public service "spots", or by assigning time to documentaries, interviews, discussions, talks or any other programming which gives the other point of view.

8. FCC 60-970, 20 P & F Radio Reg. 1901; FCC 63-412, 25 P & F Radio Reg. 1731.

9. More specific rules apply to appearances by candidates under Section 315 and to political editorials under Commission rules.

It is therefore respectfully submitted that the questions presented are:

1) Does the FCC have power, in determining whether to grant or renew a station license, to consider whether the station's programming serves the public interest, convenience and necessity?

2) May the Commission reasonably determine that it is not in the public interest for a station to broadcast programs advocating the smoking of cigarettes without devoting significant time to the view that cigarette smoking is hazardous to health?

CIGARETTE LABELING ACT

It is respectfully submitted that the question as to the effect of the Federal Cigarette Labeling and Advertising Act should not be considered by this Court because all relevant provisions of the act will expire on June 30, 1969. Accordingly, any such issue is transitory and likely to be moot within a short time of the Court's decision.

ABC suggests (at 9) that this issue is not moot because there are numerous unresolved cigarette complaints pending and thousands of license renewals to be submitted. However, no action has yet been taken against any station. In the entire history of the Fairness Doctrine the FCC has never revoked a license, denied a license renewal, issued a cease-and-desist order, or levied a forfeiture. The Court need not consider this issue merely because the question may in the future become important in some such proceeding. Moreover, the issue does not involve the Constitution, does not present a substantial federal question, and has not divided the circuits.

Respectfully submitted

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